INDEX

CITATIONS

634420—45——1

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 589

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

WILLIAM D. DISSTON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The Tax Court entered a memorandum opinion (R. 39-41) which is not reported. The opinion of the Circuit Court of Appeals (R. 46-53) is reported at 144 F. 2d 115.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 12, 1944. (R. 53.) The petition for a writ of certiorari was filed on October 12, 1944, and was granted on February 5, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether gifts made by the taxpayer to his minor children under trusts for their benefit were of "future interests in property", and hence not within the $5,000 exclusion provision of Section 504 (b) of the Revenue Act of 1932.

2. Whether the tax liability for the tax years is to be determined by correctly computing the aggregate net gifts made by the taxpayer in prior years, even though the amount of net gifts was erroneously computed in the taxpayer's returns for those years and the tax liability for those years is closed by the statute of limitations.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 502. COMPUTATION OF TAX.
>
> The tax for each calendar year shall be an amount equal to the excess of—
>
> (1) a tax, computed in accordance with the Rate Schedule hereinafter set forth, on the aggregate sum of the net gifts for such calendar year and for each of the preceding calendar years, over
>
> (2) a tax, computed in accordance with the Rate Schedule, on the aggregate sum of the net gifts for each of the preceding calendar years.
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> * * * * *
>
> SEC. 504. NET GIFTS.
>
> (a) *General Definition.*—The term "net gifts" means the total amount of gifts made

during the calendar year, less the deductions provided in section 505.

(b) *Gifts Less Than $5,000.*—In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first $5,000 of such gifts to such person shall not, for the purposes of subsection (a), be included in the total amount of gifts made during such year.

SEC. 505. DEDUCTIONS. [As amended by Sec. 301 (b) of the Revenue Act of 1935.]

In computing net gifts for any calendar year there shall be allowed as deductions:

(a) *Residents.*—In the case of a citizen or resident—

(1) *Specific exemption.*—An exemption of $40,000, less the aggregate of the amounts claimed and allowed as specific exemption for preceding calendar years.

* * * * * * *

Treasury Regulations 79 (1936 ed.):

ART. 9. *Net gifts.*—The tax is computed upon the amount of the donor's net gifts (see articles 5, 6, and 7). The term "net gifts" means the "total amount of gifts" computed as provided in section 504 (see article 10), less the deductions provided in section 505. (See articles 12 and 13.)

ART. 11. *Future interests in property.*—No part of the value of a gift of a future interest may be excluded in determining the total amount of gifts made during the calendar year. "Future interests" is a legal

> term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time. * * *

STATEMENT

The facts, as stipulated (R. 16–17, 36–38) and found by the Tax Court (R. 39–40), are not in dispute. They may be summarized as follows:

By deed dated December 17, 1936, the taxpayer created a trust for the benefit of each of his five children, three of whom were then minors. (R. 16–17.) In auditing the taxpayer's gift tax return for the year 1936, the Commissioner determined that the taxpayer had made gifts in that year to his wife and children in an aggregate amount of $71,952.49. (R. 16–17.)

The Commissioner allowed the taxpayer an exclusion of $5,000 on each gift to his five children and on the gift to his wife. The taxpayer's net gifts for the year 1936, after deducting an exemption of $40,000, were accordingly computed to be $1,952.49, upon which a tax was duly assessed and paid. (R. 17.)

On March 21, 1937, the taxpayer augmented the corpus of the trust by transferring to the trustees 500 shares of stock having an aggregate value of $25,000. (R. 17.) Upon receipt of this stock the trustees allocated 100 shares, having a

value of $5,000, to each of the taxpayer's five children, three of whom were still minors. (R. 17.) On December 9, 1938, the taxpayer created another trust for the benefit of each of his five children, the corpus consisting of two tracts of land worth $38,581.54. (R. 17.) When the 1938 trust was established, two of the taxpayer's children were still minors.

The terms of the two trusts were substantially identical in their provisions for each of the taxpayer's minor children. The trust instrument of December 17, 1936, provided, in part, as follows (R. 18–23):

> SECOND: Terms of the Trust: Trustees shall divide the principal of the trust into five equal shares and shall hold, manage, invest and reinvest the principal of said shares in accordance with the powers hereinafter granted, IN TRUST, NEVERTHELESS, as follows:
>
> * * * * *
>
> 3. As to the third of said equal shares of principal, to accumulate the net income therefrom for the benefit of WILLIAM L. DISSTON until he reaches the age of twenty-one years, at which time to pay over to him all accumulated income, and thereafter to pay over to him in not less than quarterly instalments the entire net income derived therefrom during his lifetime; provided, however, that upon his reaching the age of forty-five years one-half of the principal of his share shall be paid

over to him free and discharged of all trusts; * * *

* * * * *

6. Trustees shall hold the shares of minors in whom the principal shall have vested during their respective minorities, and during such time shall apply such income therefrom as may be necessary for the education, comfort and support of the respective minors, and shall accumulate for each minor until he or she reaches the age of twenty-one years, all income not so needed. The foregoing clause shall apply to minor children of the Settlor irrespective of the direction heretofore set forth to accumulate all income for such minors. In the administration of the shares of the minors, the Trustees shall have all of the powers, duties and discretions, including the power of investment and reinvestment, as are conferred upon them as Trustees hereunder.

* * * * *

FOURTH: Trustees' Powers: * * *

* * * * *

7. To apply the income to which any beneficiary shall be entitled hereunder for the maintenance, education and support of such beneficiary should he or she by reason of age, illness or any other cause in the opinion of the Trustees be incapable of dispensing it. Payment by the Trustees to the parent of any minor or to the person with whom such minor resides and the

receipt of such parent or such person shall be sufficient acquittance and discharge to the Trustees for such payment or payments.

* * * * *

Partial payments of income from the 1936 trust were made to the parent of the minor beneficiaries in each of the years 1936, 1937, and 1938. (R. 36–38.) At the time the case was before the Tax Court there had been no net income from the 1938 trust. (R. 38.) In 1937, checks representing trust income were sent by the corporate trustee to the mother of the then minor beneficiaries, but she returned them with instructions to accumulate and hold the income until the children became of age. (R. 37–38.) The third child became of age April 12, 1938. (R. 36.) After 1937 the trust income for the fourth child was accumulated until she became of age. (R. 38.) Since 1937 the trust income for the youngest child has been accumulated. (R. 38.)

In determining the taxpayer's gift tax for the year 1937, the Commissioner disallowed three $5,000 exclusions from taxpayer's net gifts for that year on the ground that the gifts to the three minor children were gifts of future interests. (R. 5–6.) For the year 1938, the Commissioner disallowed two $5,000 exclusions from taxpayer's net gifts for that year on the ground that the gifts to the two children who were still minors were gifts of future interests. (R. 13.)

The Tax Court upheld the Commissioner's determinations (R. 41), but its decision was reversed by the Circuit Court of Appeals for the Third Circuit, sitting *en banc* (R. 46–53). Judge Biggs dissented. In its opinion the court below expressly overruled its prior decision in *Commissioner* v. *Taylor*, 122 F. 2d 714, certiorari denied, 314 U. S. 699.

For the purpose of determining the taxpayer's net gifts in prior years the Commissioner adjusted the exclusions which had been allowed for the gifts to the minor children in computing the taxpayer's 1936 gift tax. (R. 6.) At the time this adjustment was made the year 1936 was closed by the statute of limitations. (R. 41.)

The Tax Court also upheld the Commissioner's determination in this respect. (R. 41.) In view of its conclusion regarding the principal question, however, the court below did not pass on this question. The dissenting opinion expressed the view that the Commissioner's action was proper. (R. 52–53.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred in holding that the gifts to taxpayer's minor children were not gifts of future interests within the meaning of Section 504 (b) of the Revenue Act of 1932, and in reversing the decision of the Tax Court.

SUMMARY OF ARGUMENT

I

The ruling below rests upon the ground that the gifts to the minor beneficiaries, like those to the adults, were immediately vested, irrevocable, definite, and not uncertain either as to the identity of the donees or the quantum of the gifts. The recent decision of this Court in *Fondren* v. *Commissioner* shows that the reliance of the court below upon these factors was erroneous. The gifts here, as in the *Fondren* case, were limited to commence in enjoyment in the future, both as to principal and income, and hence were gifts of "future interests in property" within the meaning of the statute and the applicable regulations.

The gifts of principal under both trusts in this case are future, since none of the principal can be paid over before the beneficiaries reach 45, except on the earlier future contingencies of illness or emergency. The income cannot be paid over until the beneficiaries reach 21, except for such portions of the income estate as may be necessary before then for their education, comfort and support. The limitations leave open the possibility that the beneficiaries may not need or enjoy the income of these trusts presently.

So far as the trust instruments themselves are concerned, therefore, the gifts of income are of "future interests." To permit an inquiry into the circumstances surrounding the donation, in

order to determine whether the beneficiaries had a present need which might be expected to compel the trustee to distribute all of the trust income currently throughout the accumulation period, would appear to frustrate the evident expectation of Congress that the term "future interests" would, without more, serve as a workable criterion for determining exclusions.

If, however, extraneous circumstances may properly be considered, such circumstances in the present case do not show the gifts of income to be present interests. As to the 1936 trust, there is no showing that the income was presently needed by the beneficiaries when the trust was created; indeed, the evidence is to the contrary. If any part was presently needed, its value is unknown. The gifts made under the 1936 trust in 1937 were undoubtedly future interests, for none of the income was needed after the early part of 1937. No present interests were given in the income of the 1937 trust, for that trust produced no income. If a present interest was given, it had no value.

A gift the enjoyment of which is postponed is a gift of a future interest, whether the gift is made to a minor beneficiary and the postponement is concurrent with his period of incompetence, or whether the gift is made to an adult. To treat such a gift as a future interest in both of these circumstances does not penalize gifts to minors.

but only puts them upon the same basis as gifts to adults. Nothing in the statute indicates that Congress intended to treat them differently.

II

The gift tax liability for 1937 and 1938 is dependent upon the computation of a tax on the aggregate sum of the net gifts for each of the preceding calendar years. The Tax Court correctly held that in determining the gift tax liability for 1937 and 1938 the aggregate sum of the net gifts for each of the preceding calendar years is to be correctly computed, even though the tax paid by the taxpayer in 1936 was based upon an erroneous determination of the amount of net gifts in that year, and the tax liability for that year is now closed by the statute of limitations.

ARGUMENT

I

THE INTERESTS GIVEN TO THE MINOR BENEFICIARIES WERE FUTURE INTERESTS

The opinion in *Fondren* v. *Commissioner*, decided on January 29, 1945, rejects as erroneous the process of reasoning by which the court below came to the conclusion that the gifts to the minors here were gifts of present interests. The court below found, contrary to the conclusion of the Tax Court, that the gifts to the minor children were "immediate, definite, absolute, and ir-

revocable. In no respect did they depend upon the happening of an uncertain future event either for the determination of the donees or the quantum of the gifts." (R. 49.) In referring to the gifts as "immediate" the court evidently meant that the beneficiaries' interests were presently vested, for it held that despite the provision for accumulation of income, "The gifts were the property of the minor donees none the less; and so was the income which recurrently accrued thereon even though it was to be accumulated during the donees' minority." (R. 50.) It stated that "The surrender of ownership by the donor of the subject matter of the gifts and the investiture of the donees therewith was just as certain and definite in the case of the minors as it was in the case of the adults." (R. 51.) The court's overruling of *Commissioner* v. *Taylor*, 122 F. 2d 714 (C. C. A. 3d), certiorari denied, 314 U. S. 699 (R. 51), provides further proof that the decision below proceeds on a basis wholly inconsistent with the rationale of the *Fondren* decision, for in the *Taylor* case, as in *Fondren*, two barriers stood between the time of the gift and its enjoyment—the "sole discretion" of the trustee and the need of the income for education and support.

Contrary to the premises from which the court below proceeded, the *Fondren* opinion establishes that the donor's surrender of ownership and the

investiture of the donees are irrelevant,[1] for as Mr. Justice Rutledge, speaking for the Court, stated:

> The question is of time, not when title vests, but when enjoyment begins.

And in so far as the opinion below relies upon the fact that here the donees were known and the quantum of the gifts was certain, its reliance is erroneous, for, as this Court held—

> the crucial thing is postponement of enjoyment, not the fact that the beneficiary is specified and in *esse* or that the amount of the gift is definite and certain.

The facts of this case do not differ in any material respect from those of the *Fondren* case. The cases are essentially alike, the differences being that here the period for accumulating income terminates when the beneficiaries reach 21 years of age instead of 25, 30, and 35, and the accumulated income is to be paid over at age 21, not simultaneously with the distribution of the corpus. (R. 19–20, 28–29.) Distribution of a part of the corpus is to occur when the beneficiary reaches

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[1] In *Wisotzkey* v. *Commissioner*, 144 F. 2d 632, decided after the instant case, the court below likewise regarded these factors as irrelevant. There under the Group III trusts the accumulation of income was mandatory until the beneficiaries became 21 years of age, and the income accumulated in that time became part of the corpus, to be distributed at a future date. In holding that the gift of the income was a future interest, the court said that the controlling interest is not that which he donor parted with, but that which the donee receives.

45 years of age; the other part will never be distributed to him but will pass to his descendants, either such descendants as he may appoint by will or his descendants generally, after his death, as will the entire corpus if he dies before reaching 45. (R. 19–20, 28–29.) The trustees here are authorized to expend out of principal such sums as they may consider to be for the best interests of the beneficiary, minor or otherwise, during illness or emergency, in no case to exceed 10% of the particular beneficiary's share of the principal. (R. 23, 32.) The trusts require the trustees to accumulate the income until each of the beneficiaries becomes 21, but also provide that the trustees during such time (R. 21, 29–30)—

> shall apply such income therefrom as may be necessary for the education, comfort and support of the respective minors, and shall accumulate for each minor until he or she reaches the age of twenty-one years, all income not so needed.

There is no recital here, as there was in the *Fondren* trusts, that the beneficiaries are expected to have other and adequate means of support. Some of the trust income here was paid over for the minor beneficiaries in 1936 and 1937 (R. 36–38); in 1937 the mother of the beneficiary returned some of the checks issued to her for income payments by the corporate trustee (R. 37–38). After 1937 the income for the beneficiaries who continued to be minors was accumulated during their

minority. (R. 38.) One of the two trusts produced no net income. (R. 38.)

We submit that the differences of fact between this case and the *Fondren* case are without significance, and do not call for a difference in result.

Disregarding for the moment the power of the trustees to pay income over for education, comfort and support, we think it immaterial that the period of accumulation of income here was to terminate at age 21 instead of age 25 and later, as in the *Fondren* case. If all of the income were to be accumulated until the beneficiaries reach 21, the income estate would unquestionably be a future interest even though the accumulations would be concurrent with the minorities of the beneficiaries. With this conclusion the court below agrees. *Wisotzkey* v. *Commissioner,* 144 F. 2d 632. By the same token the beneficiaries' interests in the trust principal are future interests, even as to the 10% of the principal which might be paid over during illness or to meet an emergency, for these are contingencies of need in the future and fall squarely within the *Fondren* opinion. The trustees are required to continue to hold half of the principal until the beneficaries reach age 45, and the other half until after their death, except upon the earlier occurrence of illness or emergency—needs not existing at the time the gift took effect but which might arise later through anticipated but unexpected conditions. Thus, even if

the gift of the income were held to be a gift of a present interest, the gift of the corpus is one *in futuro. Fisher* v. *Commissioner,* 132 F. 2d 383 (C. C. A. 9th); *Sensenbrenner* v. *Commissioner,* 134 F. 2d 833 (C. C. A. 7th).

It is equally clear, we think, that the gift of income to each of the minor beneficiaries is a gift of a future interest. Each trust provides for accumulation of the net income and directs the trustees during the accumulation period to "apply such income therefrom as may be necessary for the education, comfort and support" of the minor children, and to accumulate the balance. The gift of income is unquestionably indefinite as to amount and time of enjoyment. This factor alone would be sufficient to establish the future character of the gift. Beyond that, however, we submit that the trust instruments themselves show that they were intended to be merely reserves available in case of necessity. They contain no positive direction to the trustees to pay over the income for the benefit of the minors, either periodically or currently. The trust instruments contain, we believe, an implicit recognition that other funds might be primarily available for the education and support of the minor children. It is not fortuitous, of course, whether the children will be supported and educated out of some funds, but it is fortuitous, so far as the trust instruments are concerned, whether the income from these trusts will be used for such purpose. The vesting in the

trustees of the power to pay over or accumulate the income shows that the grantor himself could not predict what the need would be; he left that for the trustees to determine from time to time according to future circumstances. The power given to the trustees assumes also that the trustees shall make the initial judgment, both as to the need of the beneficiaries and the amount of trust income required to satisfy that need. In the exercise of that judgment the trustees are required only to act reasonably, and if they should reasonably determine that none of the income or only a part of it was needed, they could not be compelled to make distribution. The enjoyment of the gift by the beneficiaries is thus dependent, under any trust like the present one, upon the need of the beneficiaries for the income for their education, comfort and support; upon the continuance of that need throughout the period when the income is directed to be accumulated, upon the availability of other funds; and, to a substantial degree and as to all these matters, upon the trustees' exercise of judgment. These conditions upon which the enjoyment of the gift is dependent are to occur in the future; if not, the deed would contain no provision for accumulating the income.

An interest whose enjoyment is dependent upon such future contingencies is, we believe, a future interest. It is not an interest "limited to commence" in enjoyment at the time the gift is made.

Cf. Treasury Regulations 79, Article 11, *supra*, pp. 3-4. So far as the beneficiary receives present enjoyment of any part of the income, he does not do so because the enjoyment is "limited to commence" at present, but because of circumstances *dehors* the limitations in the trust instruments, which show a need so compelling as to require distribution of the trust income by the trustee.

Moreover, we do not think it can be said that the need here was presently existing when the gift was made, and therefore that the gift of income was a present gift. Presently existing need cannot be presumed in the face of the grantor's direction to accumulate the income. If there was such a need, that fact must be proved by extrinsic evidence showing, *inter alia*, the beneficiaries' station in life and how much they require for their "comfort", what likelihood there is that the parents will continue to support the beneficiaries from resources outside the gift, what other property the beneficiaries may have available either by reason of other gifts or bequests or other donations to the same trust in earlier years, whether the trustees are likely to be liberal or stringent in their application of the trust income, and what likelihood there is that the need existing when the trust is created will continue throughout the accumulation period. Even when such a showing is made, unless it is proved that all of the income will in reasonable certainty be paid

over as it accrues, it still is necessary to value the present interest of the donee. Some part of his interest, at least, is limited to commence in enjoyment in the future, and before the exclusion may be allowed with respect to any portion of the gift the present interest must be evaluated. See the opinion of Judge Biggs dissenting below. (R. 52–53.) The exclusions here involved are no different from any other exemptions in the requirement that the taxpayer must prove the facts entitling him to the exemption which he claims. Cf. *New Colonial Co.* v. *Helvering,* 292 U. S. 435. The interests here do not become present interests simply because the income might all be paid over to the beneficiaries currently and the accumulated income might, if necessary, be entirely exhausted. See *Wisotzkey* v. *Commissioner,* 144 F. 2d 632, 637. Such reasoning ignores the fact that some part of the gift is limited to commence in possession or enjoyment in the future. It ignores also the burden incumbent upon the taxpayer to prove that the interest in question is an interest with respect to which the exclusion is allowable.

In considering whether such an inquiry into circumstances *dehors* the trust may be availed of to show that the donee's interest is not a future interest, it must be emphasized that Congress was in search of a workable rule. The use of the term "future interests" was adopted as a means of eliminating problems of determining the eventual tak-

ers of the gift and the value of their interests. See *United States* v. *Pelzer,* 312 U. S. 399, 403; H. Rep. No. 708, 72d Cong., 1st Sess., p. 29 (1939-1 Cum. Bull. (Part 2) 457). It was not the Congressional intent, in making use of that term, to subject to litigation every gift made to a trust like the one here involved.[2] We believe that interests which might be enjoyed only in the future, from all that appears on the face of the trust instrument, are future interests within the meaning of the statute.[3] Such a decision would be desirable

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[2] The question could never be finally determined with respect to any trust of the present kind. The income from the original gift in trust might be found to be no more than sufficient to meet the beneficiary's need. But with each subsequent gift augmenting the trust estate, the question arises again. The present case, like the *Fondren* case, illustrates the tendency of donors to make gifts of less than $5,000 from year to year to the same trusts and the same donees to derive the full advantage of the annual exclusion.

We know of no Congressional policy requiring broad application of the exclusion; it is retained in the statute only because administrative difficulties prohibit its abolition. See H. Rep. No. 2333, 77th Cong., 2d Sess., p. 37 (1942-2 Cum. Bull. 372), relating to the Revenue Act of 1942 in which the exclusion was reduced to $3,000:

"Since this is an annual exclusion (not exhaustible as is the specific exemption) and is not limited to any number of donees, it is possible to distribute property of large aggregate value over a period of years, free not only of gift tax but of estate tax as well. While administrative difficulties prevent the abolition of the exclusion, your committee recommend that it be reduced to $3,000."

[3] Circuit Court of Appeals decisions appear to be in conflict on the question whether circumstances surrounding the creation of the trust may be considered. Thus *Smith* v. *Commis-*

for the avoidance of litigation. However, if the question is to be determined from the circumstances surrounding each particular gift, we submit that the circumstances here do not show the gifts at bar to be gifts of present interests, and that no exclusions are allowable.

We think that no particular significance is to be attached to the fact that the trust instruments here do not recite, as they did in the *Fondren* case, that the beneficiaries will have other and adequate means of support, or that the trustees under the 1936 trust paid over some of the income to the mother of the minor beneficiaries in 1936 and part of 1937. The absence of the recital merely leaves the record lacking in proof as to the beneficiaries' need for the income. The payments which were made under the 1936 trust hardly establish that there was a need so great as to compel distribution. The payments at best are equivocal evidence of need, since some of the checks given by the corporate trustee in 1937 were returned by the beneficiaries' mother, presumably because they were not needed. Certainly, so far as the beneficiaries did enjoy part of the income estate, they did so not because that estate as limited was a present one, but because of the circumstance that the trustees exercised their judgment in the beneficiaries' favor

sioner, 131 F. 2d 254 (C. C. A. 8th), which turned upon such an inquiry has been said to rest upon "an unsecure foundation." *Fisher* v. *Commissioner*, 132 F. 2d 383, 386 (C. C. A. 9th).

even though they were not compelled to do so. But the nature of the interest of the beneficiaries is determined as of the date of the gift, not by what the trustee may subsequently choose to do in the exercise of the powers given to him. *Commissioner* v. *Gardner,* 127 F. 2d 929, 931 (C. C. A. 7th); *Commissioner* v. *Brandegee,* 123 F. 2d 58, 61 (C. C. A. 1st). Throughout the remainder of the beneficiaries' minorities until the time of trial the income was accumulated, thus demonstrating that the right to enjoy so much of the income, at least, was dependent upon a contingency of need in the future, and was not a present interest. The present record does not show that any of the income of the 1936 trust was a present interest.

Moreover, with respect to the 1936 trust, gifts were made in different years; first, when the trust was created in 1936, and, second, in March of 1937 when further securities were transferred in a value of $5,000 for each beneficiary. (R. 16–17.) Both donations are involved here, the first in determining the amount of the taxpayer's net gifts for years prior to the tax year (see point II, *infra,* pp. 23–25), and the second in determining the net gift made in the tax year. Even if it were to be held, contrary to our contention, that the first donation was made in such circumstances of need that the interests were present, nevertheless the second donation clearly was not made under such

circumstances. The record shows that no income was needed by the beneficiaries after the early part of 1937. (R. 37–38.)

Under the 1938 trust no income had been produced prior to the hearing below, nor did the grantor expect that any income would be produced, the corpus consisting wholly of entirely unimproved real estate. (R. 38.) We submit that the beneficiaries took no present interest in the non-existent income from that gift. Certainly any present interest which they may have taken in the income estate had no value. And their interests in the corpus were clearly future interests. The corpus was to be held by the trustees until the beneficiaries reached 45; then only part of it would be paid over. (R. 18–21, 27–29.) The corpus could be invaded to a limited extent only, and only during illness or emergency.

We submit, therefore that no exclusion is allowable with respect to either trust.

II

THE STATUTE OF LIMITATIONS DOES NOT PRECLUDE THE CORRECT DETERMINATION OF THE AMOUNT OF NET GIFTS MADE BY THE TAXPAYER IN PRIOR YEARS, FOR THE PURPOSE OF DETERMINING THE CORRECT TAX LIABILITY FOR THE CURRENT YEARS

The gift tax for each calendar year is the excess of a tax, properly computed, on the aggregate of net gifts made in the tax year and in each preced-

ing calendar year over a tax, properly computed, on the aggregate of net gifts made in preceding calendar years. Revenue Act of 1932, Section 502, *supra*, p. 2. The taxpayer maintained in the Tax Court that since the statute of limitations had run against the year 1936, the Commissioner could not make a new, correct determination of the net gifts made in 1936 for the purpose of computing the tax for 1937 and 1938. The Tax Court rejected the contention (R. 41) and the Circuit Court of Appeals did not reach the question, although Judge Biggs in his dissenting opinion stated that the Tax Court's ruling on this point was correct (R. 24).

The statute[4] precludes assessment or a proceeding in court without assessment for the collection of taxes after three years after the return was filed. Hence the tax liability for 1936 is closed. But the statute does not purport to preclude an examination into events of prior years for the purpose of correctly determining the gift tax liability for years which are still open.

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[4] Revenue Act of 1932:

SEC. 517. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

(a) *General Rule.*—Except as provided in subsection (b), the amount of taxes imposed by this title shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of three years after the return was filed.

* * * * *

This view is supported by the pertinent Treasury Regulations[5] and has been uniformly applied by the Tax Court. *Winterbotham* v. *Commissioner*, 46 B. T. A. 972; *Roberts* v. *Commissioner*, 2 T. C. 679, affirmed on another issue, 143 F. 2d 657 (C. C. A. 5th), certiorari denied, February 5, 1945; *Wallerstein* v. *Commissioner*, 2 T. C. 542. The situation is analogous to that involved in *Commissioner* v. *Gooch Co.*, 320 U. S. 418, where an audit made in 1938 of the taxpayer's books disclosed an erroneous valuation of its inventory of June 30, 1935. Because of this error the taxpayer had overpaid its income taxes for 1935, and the excess payment was not subject to refund because barred by the statute of limitations. On the basis of the adjusted inventory, however, the Commissioner determined that there was a tax deficiency for 1936. This Court confirmed the action of the Board of Tax Appeals in sustaining the Commissioner's determination, holding that the Board had power to redetermine the 1936 deficiency distinct from any overpayment or underpayment in any prior or subsequent year.

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[5] Treasury Regulations 79, Article 5:

* * * By the words "aggregate sum of the net gifts for each of the preceding calendar years" (aside from the amount of the specific exemption deductible) is meant the true and correct aggregate of such net gifts, not necessarily that returned for such years and in respect to which tax was paid. * * *

CONCLUSION

We submit that the decision of the Tax Court was correct, and that the decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

SEWALL KEY,
J. LOUIS MONARCH,
ROBERT KOERNER,
Special Assistants to the Attorney General.

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